



BARNES & THORNBURG

600 One Summit Square
Fort Wayne, Indiana 46802
(260) 423-9440

PATENT APPLICATION
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Customer No.: 23641 }
Application No.: 09/406,290 }
Confirmation }
No.: 1448 }
Filing Date: September 24, 1999 }
Examiner's }
Name: Christopher R. Buchanan }
Group Art }
Unit: 3627 }
Attorney }
Docket No.: 37168/82045 }
First Named }
Inventor: Jeffrey K. Dellinger }
Title: METHOD AND APPARATUS }
FOR PROVIDING RETIREMENT }
INCOME BENEFITS }

AFFIDAVIT PURSUANT TO 37 C.F.R. SECTION 1.132

Assistant Commissioner for Patents
Washington, D.C. 20231

Sir:

I, Denis G. Schwartz, declare as follows:

1. I am an actuary and Second Vice President with the Lincoln National Life Insurance Company of Fort Wayne, Indiana (hereinafter "LNLIC"). I am one of the named co-inventors of the above-referenced Patent Application Serial No. 09/406,290

("the '290 application") and I have knowledge of and relating to the subject matter of that application, including the complete disclosure and claims thereof.

2. I received a Masters Degree in Theology from the University of Dayton, Ohio in 1985 and became a Fellow in the Society of Actuaries in 1986. I have also been a Member of the American Academy of Actuaries since 1987. I have been continuously employed by LNLIC since 1983. I am familiar with the design and state of the art of insurance and annuity products.

3. I understand that, in an Office Action mailed February 28, 2003, the Examiner has rejected Claims 1-3 and 7-43 of the '290 patent application as being obvious over U.S. Patent No. 5, 933, 815 to Golden ("Golden"), in view of U.S. Patent No. 6,253,192 to Corlett et al. ("Corlett"). I further understand that the Examiner has rejected Claims 4-6 of the '290 application as being obvious over Golden in view of U.S. Patent No. 6,085,174 to Edelman ("Edelman"). I have read and understood all of the claims rejected by the Examiner. I have also read and understand the Golden, Corlett and Edelman patents. I disagree with the Examiner's conclusions that the subject matter of any of claims 1-43 is obvious over the Golden patent, in view of the Corlett patent or Edelman patent.

4. On page 11 of the Office Action dated February 28, 2003, the Examiner states as follows:

Applicant argues that Golden discloses a method relating to annuities with fixed payments and not variable annuities as in the instant invention. Variable annuities being the general form of annuities, with payments that vary on a host of circumstances, fixed annuities are merely a special case of variable annuities in which the variability of the payments is zero.

I disagree with the Examiner's assertions that variable annuities are "the general form of annuities" and that "fixed annuities are merely a special case of variable annuities in which the variability of the payments is zero." The term "variable," when used to describe annuities and annuity payments, is a term of art that has a specific meaning that goes beyond the common understanding employed by the Examiner, as will be shown in the following paragraphs.

5. The following definitions appear in Georgia insurance regulation 80-5-3.01:

"A 'variable annuity' means a contract that pays an annuitant income payments of which the amounts *vary in accordance with the market value of the securities in the separate account of the insurer on the respective valuation days.*" [emphasis added]

"A 'fixed annuity' means one party agrees to pay to the annuitant a stipulated amount (monthly, quarterly, semiannually, or annually, as desired) throughout the annuitant's lifetime whereby *the dollar amount will not fluctuate regardless of adverse changes in the insurance company's mortality experience, investment return, and expenses.*" [emphasis added]

These definitions make clear that the term "variable" does not merely mean that payments are not always of equal amount (the common understanding), but that they *vary in accordance with the market value* of the assets underlying the payments. While fixed annuity payments may "vary" according to the common understanding, by law they may not and cannot "vary" with the market value of the assets underlying them. Therefore, fixed annuities are not, and cannot properly be viewed as, "merely a special case of variable annuities" as maintained by the Examiner. Similar definitions exist in the laws and regulations of other states. In the insurance and annuity industry, fixed annuities and variable annuities are distinct and separate products.

6. The Golden patent relates exclusively to fixed annuities. In the preferred embodiment, Golden's annuity provides two periods: a "guaranteed period" and a "life contingent period." During the guaranteed period, payments are fully guaranteed as to their amount (though the amount may "vary" according to agreed-upon criteria; for example, the amount may be an increasing amount). Golden's patent does provide a unique element in offering liquidity during this period and, if the owner surrenders a portion of the underlying Guaranteed Interest Rate Options (GIROs), payments during the guaranteed period will be reduced (but only as a direct result of the owner's action). Golden's annuity is clearly a fixed annuity during the guaranteed period.

Golden's annuity is also a fixed annuity during the life contingent period. During this second period, payments are again fully guaranteed as to amount and, since no liquidity is offered, will never fluctuate from the agreed-upon amounts.

Golden does suggest three alternative embodiments, each of which allocates some portion of the initial consideration to non-guaranteed investments. These non-guaranteed investments are ultimately used to *purchase at some future date* additional fully-guaranteed payments (for one or more "periods" in the life of the annuity). These additional amounts (whose value is not determined until additional GIROs or LCAs are purchased) once again constitute fixed annuity payments whose value does not fluctuate from that point forward with the market value of any underlying assets.

Golden also makes reference to "target" payments and making adjustments to achieve those target payments. With one exception, however, the adjustments are made by using new or existing non-guaranteed assets to purchase additional GIROs or LCAs and *not* by adjusting any of the already-guaranteed payments. The exception is that

Golden appears to allow renegotiation of the starting date for the life contingent payments, *provided* any changes are made before the life contingent period actually begins. Such an adjustment in no way makes the Golden annuity a variable annuity.

7. The annuity plan(s) discussed and claimed in the present application are variable annuities. Payments fluctuate with the market value of the assets in a separate account maintained by the insurance company, or other plan provider(s). However, in the various embodiments of the plan, the degree to which payments may fluctuate is limited by guaranteeing a minimum payment. The provision of a minimum guaranteed payment does not negate the annuity plan's status as a variable annuity, since changes in the market value of the underlying assets can affect the amounts of the payments. Indeed, in most cases such asset value changes will cause the payments to vary at levels above the minimum guarantee. If the minimum guarantee is paid in one or more periods, subsequent changes in the market value of assets might result in future payments higher than the minimum guarantee. One exception to the variable nature of the annuity can occur: if payment of the guaranteed minimum amounts ever causes the assets in the separate account to become exhausted, then all future payments will no longer fluctuate with the market value of assets in the separate account (there will be no assets in the account), and those future payments will then resemble payments made under a fixed annuity.

8. On page 11 of the Office Action dated February 28, 2003, after concluding that fixed annuities are merely a special case of variable annuities, the Examiner states that "[I]t would be obvious to one skilled in the art that the annuity could be tailored to provide payments with a variety of variability, for example, ascending, descending,

constant and so forth (see Golden, col. 9, line 40+)." The cited passage from Golden states that "the client specifies the type of payment plan desired, i.e., whether he wishes to receive level distributions or regularly increasing distributions which provide protection against the effects of inflation on the client's purchasing power." Golden goes on to describe how the payments are calculated under either the fixed or regularly increasing distribution option. Golden is clearly referring to a fixed annuity plan in this passage. The two options offered (fixed or regularly increasing distributions) do not in any way vary with changes in the market values of the underlying assets. Golden is very specific as to the two options available to a client under the embodiment described in columns 9 and 10 of his patent.

9. On page 12 of the Office Action dated February 28, 2003, the Examiner states that:


Corlett is used merely to show a method for financial planning that explicitly discloses a process for determining whether a target payment has been met (or exceeded) and how to act so as to always have a value at least equal to a selected target payment (see Figs. 5A and 5B).

The Corlett patent discloses a method of personal financial planning. In this method, a financial model is created from information gathered from an individual regarding income, expenses, assets and liabilities. With specific reference to Figs. 5a and 5b cited by the Examiner, Corlett discloses an "automatic allocation and funding program" which makes periodic recommendations as to how to invest projected cash flow surpluses, or fund cash flow deficits, depending upon the subject's predefined preferences and the previously gathered financial information.

Contrary to the Examiner's statement at the end of the carryover paragraph on page 12 of the Office Action dated February 28, 2003, it would not be obvious to one of

skill in the art of annuities to use this program in the calculation of current benefit payments for an annuity. Indeed, Corlett's process could not be used for this purpose. The manner of calculating the amounts of current benefit payments for an annuity are well known in the insurance and annuity industry. An example of the manner in which current benefit payments are determined may be found, for example, in dependent claim 5 of the present application. A method of personal financial planning such as disclosed by Corlett cannot, and would not, be used by an insurance company, or other plan provider, to determine the amounts of payments, nor to determine whether a "target" has been met (or exceeded), nor for any other purpose. In any event, neither Corlett, Edelman, nor any of the other references of record alter the fact that Golden is directed exclusively to fixed annuities, while the claims of the present invention are directed to variable annuities (i.e., annuities in which payment amounts vary with market changes in the values of the underlying assets). Neither Corlett nor Edelman are directed to variable annuities. Accordingly, the subject claims in the present application are not obvious in view of the Golden patent, nor in view of any of the combinations of Golden, Corlett or Edelman referenced by the Examiner.

Further affiant saith not.



Denis G. Schwartz